



U.S. Department of Justice

Office of Legal Counsel

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Office of the
Assistant Attorney General

Washington, D.C. 20530

EXHIBIT

FM-69

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Legal Authority for Recent Covert Arms Transfers to Iran

This memorandum responds to your request for a summary of the legal authorities affecting the recently disclosed arms transfers to Iran. Because the exact details of the transfers have apparently not completely transpired, this memorandum will provide a general framework for analysis, with references only to the basic facts that have already emerged. Although this memorandum does not deal with questions arising from the handling of the monies that Iran paid for the arms in question, the operation in which weapons were sold to Iran appears in other respects to have been lawful.

I. General Authority for Arms Transfers to Iran

As you know, there are numerous statutes that regulate the export of weapons. The principal statutes directly affecting transfers by the government are the Foreign Assistance Act of 1961¹ and the Arms Export Control Act.² Although both statutes establish substantially comprehensive regulatory schemes in the areas of military assistance and military sales, they do not purport to constitute the sole and exclusive authority under which the executive branch may transfer weapons to foreign nations. [Thus, the limitations that the Foreign Assistance Act and Arms Export Control Act impose on arms transfers apply only to transfers undertaken pursuant to those statutes.] If the sales to Iran were accomplished under other authorities, as we believe

¹ Codified, as amended, in relevant part at 22 U.S.C. 2311 et seq.

² Codified, as amended, in relevant part at 22 U.S.C. 2751 et seq.

they were, these restrictions would not apply.³

Consistent with the President's constitutional responsibilities for conducting the foreign policy of the nation, Congress has recognized that the executive has considerable discretion to use government resources for a variety of activities not specifically authorized by statute. Most conspicuously for present purposes, section 101 of the National Security Act of 1947⁵ assigns certain functions to the National Security Council, but expressly acknowledges that that entity may "perform[] such other functions as the President may direct." Similarly, section 102 of the same Act⁶ assigns certain functions to the Central Intelligence Agency, while authorizing that Agency "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." We believe that these two provisions may be relied on to support a wide range of foreign covert activities not otherwise forbidden by law.

The authorities exercised by the NSC and the CIA include the discretion to transfer arms to foreign recipients in the course of intelligence or intelligence-related activities. Congress recently confirmed the existence of such authority in section 403 of the Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, 99 Stat. 1002, 1006 (1985). That provision provides in relevant part:

Sec. 403. (a)(1) During fiscal year 1986, the transfer of a defense article or defense service exceeding \$1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant

³ It should be noted that the Department of State and the Department of Justice have both taken the position, long before the operation at issue in this memorandum, that arms may be transferred to foreign countries outside the context of the Arms Export Control Act. See Memorandum of Law on Legal Authority for the Transfer of Arms Incidental to Intelligence Collection, by David R. Robinson, Legal Adviser, Department of State; Letter from William French Smith to William J. Casey (Oct. 5, 1981).

⁴ For a detailed discussion of the President's constitutional powers and responsibilities, as they relate to the Iran operation, see our memorandum on section 501(b) of the National Security Act.

⁵ Codified as amended at 50 U.S.C. 402.

⁶ Codified as amended at 50 U.S.C. 403.

anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

(2) Paragraph (1) does not apply if--

(A) the transfer is being made to a department, agency, or other entity of the United States (so long as there will not be a subsequent retransfer of the defense articles or defense services outside the United States Government in conjunction with an intelligence or intelligence-related activity); or

(B) the transfer--

(i) is being made pursuant to authorities contained in part II of the Foreign Assistance Act of 1961, the Arms Export Control Act, title 10 of the United States Code (including a law enacted pursuant to section 7307(b)(1) of that title), or the Federal Property and Administrative Services Act of 1949, and

(ii) is not being made in conjunction with an intelligence or intelligence-related activity.

(3) An intelligence agency may not transfer any defense article or defense services outside the agency in conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress.

(b) As used in this section--

(1) the term "intelligence agency" means any department, agency or other entity of the United States involved in intelligence or intelligence-related activities;

This provision, which was made a permanent part of the National Security Act (new section 503) by the Intelligence Authorization Act for Fiscal Year 1987, was primarily intended to limit the executive's discretion to transfer arms in the course of intelligence-related activities. Its present significance, however, lies in its unambiguous recognition that the executive possesses such discretion apart from the Foreign Assistance Act

and the Arms Export Control Act.⁷ Assuming that the arms transferred to Iran were sold to that country at a legally justified price, the language of sections 101 and 102 of the National Security Act is broad enough to encompass the kind of discretion whose existence is manifestly implied in section 403 of the Intelligence Authorization Act. It follows that the NSC and/or the CIA had authority to arrange for the sale of arms to Iran as part of an intelligence or intelligence-related operation, subject to such other restrictions as Congress may have imposed by law. The remainder of this memorandum discusses the applicability of such restrictions.

⁷ Because subsection (a)(2) states that subsection (a)(1) does not apply to transfers made pursuant to authorities contained in the Foreign Assistance Act or the Arms Export Control Act, the clear implication is that the restriction in subsection (a)(1) applies to transfers made pursuant to some other authority.

The same implication can be drawn from other congressional actions that have imposed restrictions on covert arms transfers without suggesting that such transfers were subject to existing restrictions under the Foreign Assistance Act or the Arms Export Control Act. For example, a provision was enacted in 1974 precluding funding for military assistance to Laos outside the confines of the Foreign Assistance Act and the Arms Export Control Act. See Pub. L. No. 93-559, sec. 12, 88 Stat. 1798 (1974) (repealed by Pub. L. No. 97-113, title VII, sec. 734(a)(1), 95 Stat. 1560 (1981)).

⁸ Our point here is that the charters of the CIA and NSC appear to recognize that those entities may use their facilities to arrange an arms sale to Iran. Whether these or other governmental agencies would be authorized to spend the sums of money necessary to procure and give arms to Iran is a distinct question, which need not be addressed at this time.

Because we have not seen the classified Schedule of Authorizations referred to in section 102 of the Intelligence Authorization Act for Fiscal Year 1986 or the similar schedule referred to in the FY 1985 authorization legislation, we do not know whether anything in those schedules would affect the issues addressed in this memorandum.

This memorandum does not address the legal questions that may arise from arms having been sold to Iran at prices higher than the prices at which they were made available to the CIA or NSC.

⁹ Whether the ultimate source of this discretion is the President's inherent constitutional authority in foreign affairs, or the cited statutes, or some other statute, is a question that need not be resolved. The crucial point is that section 403 of the Intelligence Authorization Act clearly recognizes the existence of the authority, whatever its source.

II. Section 501 of the National Security Act

Under section 403 of the Intelligence Authorization Act for Fiscal Year 1986 (which has now been made permanent as new section 503 of the National Security Act), an arms transfer by either the NSC¹⁰ or the CIA exceeding \$1 million in value is subject to the congressional oversight provisions of Section 501 of the National Security Act. We have prepared a separate memorandum in which we concluded that the requirements of section 501 were satisfied as to the recent arms shipments to Iran. We will not repeat that discussion here.

III. The Hughes-Ryan Amendment

The so-called Hughes-Ryan Amendment, section 662 of the Foreign Assistance Act, (codified as amended at 22 U.S.C. 2422), provides in its present form:

10 The NSC clearly falls within the definition of an intelligence agency given in section 403(b)(1) of the Intelligence Authorization Act: "any department, agency or other entity of the United States involved in intelligence or intelligence-related activities."

11 Covert intelligence operations are subject to the congressional reporting requirements of section 501 of the National Security Act, whether they are conducted by the CIA, the NSC, or some other agency. Section 501(a), 50 U.S.C. 413(a), imposes reporting requirements not only on the Director of Central Intelligence, but also on "the heads of all departments, agencies, and other entities of the United States involved in intelligence activities" (emphasis added). Furthermore, the reporting requirements apply to "all intelligence activities which are the responsibility of, are in engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States . . ." (emphasis added). (This language is broad enough to encompass the NSC.) Finally, even if activities carried out by the NSC could somehow escape the broad language of section 501(a), section 501(b) contains unqualified language requiring the President to "fully inform the [congressional] intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section . . ." Thus, unlike the Hughes-Ryan Amendment (discussed in Part III of this memorandum), section 501 of the National Security Act applies to all intelligence operations in foreign countries, whether conducted by the CIA, the NSC, or some other governmental entity.

No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of title 50 [i.e. section 501 of the National Security Act].

The original version of this provision, Pub. L. No. 93-559, sec. 32, 88 Stat. 1804 (1974), contained identical language pertaining to the President's national security finding and also required him to "report[], in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress" In 1980, the reporting requirement was replaced with the current reference to section 501 of the National Security Act.¹²

The current version of Hughes-Ryan, which recognizes the President's authority to conduct covert operations abroad,¹³ applies by its terms only to activities involving the CIA and requires only that the President make the requisite finding before funds are expended on the operation. Thus, any transfer of arms to Iran in which the CIA was not involved (for example, an operation conducted by NSC staff members without the aid of the CIA) is exempt from Hughes-Ryan. Thus, based on what we know at this time, it appears that no presidential finding was required under Hughes-Ryan with respect to the September 1985 arms transfer to Iran.

Further, the President's written finding of January 17, 1986 sufficed to satisfy Hughes-Ryan as to CIA-assisted transfers that occurred after that date. Because the Iran project appears to have been a single, ongoing operation and because the January 17,

¹² The statutory language requiring a presidential finding was not amended, and the legislative history indicates that no change in this requirement was intended. See S. Rep. No. 730, 96th Cong., 2d Sess. 5 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4196.

¹³ Cf. 120 Cong. Rec. 33,489 (1974) (colloquy between Senators Humphrey and Hughes).

1986 finding was drafted broadly enough to cover multiple arms shipments in the course of that ongoing operation, we do not believe that separate presidential findings were required for each of the shipments that took place after that date.

Thus, the main issue under Hughes-Ryan concerns the November 1985 arms shipment. Robert McFarlane, formerly Assistant to the President for National Security Affairs, has publicly testified that shipments prior to January 17, 1986 were carried out pursuant to an oral authorization from the President.¹⁴ And it appears that CIA resources were used to facilitate the November shipment.¹⁵ The question, then, is whether the President's oral authorization of arms transfers to Iran could have implied or constituted a Hughes-Ryan "finding" that would allow the CIA to participate or aid in the transfer.

On its face, Hughes-Ryan requires only that the President find each CIA foreign operation "important to the national security of the United States" before such operation is undertaken. The Hughes-Ryan Amendment contains no requirement that this finding be reduced to writing or indeed that it be articulated in so many words.¹⁶ We believe that the main purpose of the presidential finding requirement is to ensure that the

¹⁴ Because there is some reason to believe that Mr. McFarlane's recollection was not wholly accurate, this Office is preparing a separate analysis of the legal issues that would arise from the absence of an oral authorization by the President for the September and/or November shipments.

¹⁵ There may have been pre-existing written "omnibus" Hughes-Ryan findings that would cover whatever tasks the CIA performed in connection with the November shipment. Further research into the exact nature of the CIA's participation and into the existence of such findings will be needed in order to resolve this issue.

Although the facts are not clear at this time, it appears possible that the only significant CIA involvement in the November shipment was through the use of one its proprietaries. If the proprietary was paid for its services with non-CIA funds, then CIA appropriations may not have been used at all. If that is true, Hughes-Ryan would not be applicable to the November shipment. Alternatively, the CIA's involvement in the November shipment may have been so peripheral that it should be treated in terms of a de minimis exception to Hughes-Ryan; such an analysis would require further research.

¹⁶ There are other statutory provisions requiring that findings or determinations by executive branch officials be committed to writing. See e.g., 20 U.S.C. 2836(c)(3).

President himself¹⁷ decides, before each operation, whether the national security justifies its being carried out. Such a decision, which can be inferred from an oral authorization, satisfies this purpose, and an oral authorization therefore satisfies the Hughes-Ryan finding requirement.¹⁸

So far as we know, the only legal provision suggesting that the President's finding under Hughes-Ryan might have to be in written form is found in section 654 of the Foreign Assistance Act:

(a) Report to Congress

In any case in which the President is required to make a report to the Congress, or to any committee or officer of either House of Congress, concerning any finding or determination under any provision of this chapter . . . that finding or determination shall be reduced to writing and signed by the President.

¹⁷ The President could, presumably, delegate this function to any executive branch official who had been confirmed by the Senate. 3 U.S.C. 301. Such a delegation would have to be published in the Federal Register, which would give Congress the opportunity to object or enact new legislation if it were felt that such delegation was inadvisable.

¹⁸ The legislative history of the Hughes-Ryan Amendment, which focuses mostly on the reporting requirement and congressional oversight generally, contains little discussion of the presidential finding requirement itself. On the floor of the Senate, Senator Humphrey mentioned in passing that national security "would be the only reason we would want to have covert operations . . ." The bill's sponsor, Senator Hughes, interrupted to remark, "I hope that is the only reason." 120 Cong. Rec. 33,489 (1974). We interpret this exchange to confirm our conclusion that the requisite finding could be inferred from the President's having personally authorized a particular operation. We know of nothing in the legislative history of Hughes-Ryan suggesting that Congress meant to disallow oral or implied "findings" by the President. Indeed, Senator Hughes stated on the floor of the Senate that even the congressional report itself, which was regarded as the more important requirement of the Amendment, could be delivered orally by a presidential aide. 120 Cong. Rec. 33,490 (1974) (colloquy between Sen. Hughes and Sen. Stennis).

¹⁹ Codified at 22 U.S.C. 2414.

(b) Action prohibition prior to execution of report

No action shall be taken pursuant to any such finding or determination [prior to the date on which that finding or determination] has been reduced to writing and signed by the President.

(c) Publication in Federal Register

Each such finding or determination shall be published in the Federal Register as soon as practicable after it has been reduced to writing and signed by the President. In any case in which the President concludes that such publication would be harmful to the national security of the United States, only a statement that a determination or finding has been made by the President, including the name and section of the Act under which it was made, shall be published.

(d) Information accessible to Congress prior to transmission of report

No committee or officer of either House of Congress shall be denied any requested information relating to any finding or determination which the President is required to report to the Congress, or to any committee or officer of either House of Congress, under any provision of this chapter, the Foreign Military Sales Act [22 U.S.C. 2751, et seq.], or the Foreign Assistance and Related Programs Appropriation Act for each fiscal year, even though such report has not yet been transmitted to the appropriate committee or officer of either House of Congress.

Because Hughes-Ryan and this provision are both in chapter 32 of title 22, the President would be required to reduce the required finding to writing before each covert operation if he were required to make a report concerning that finding to Congress or to any congressional committee or officer. Hughes-Ryan, however, has never required the President to make any such report concerning his findings: (1) in its present version, Hughes-Ryan requires compliance with section 501 of the National Security Act, which demands certain reports about "intelligence

activities²⁰ and "intelligence operations"²¹ but requires no reports about presidential findings;²² (2) as originally enacted, Hughes-Ryan required the President to report "a description and scope" of the operation to certain congressional committees;²³ (3) as originally introduced by Senator Hughes, the Hughes-Ryan Amendment would have required that the President provide Congress with both a report of his finding and²⁴ description of the nature and scope of each operation; the first of these requirements would have made the requirements of section 654 applicable, but this requirement was dropped from the final version of the bill; thus, Congress deliberately rejected the language that might have brought section 654 into play and substituted language that made section 654

²⁰ 50 U.S.C. 413(a)(1) (requiring that executive branch officials keep certain congressional committees "fully and currently informed of all intelligence activities" within their jurisdiction).

²¹ 50 U.S.C. 413(b) (requiring that the President "fully inform the [congressional] intelligence committees in a timely fashion of intelligence operations in foreign countries . . . for which prior notice was not given under subsection (a) of this section . . .").

²² Section 501(a)(2), 50 U.S.C. 413(a)(2), might require certain executive branch officials to provide information about presidential findings, if the information is in their "possession, custody, or control," to a congressional intelligence committee upon that committee's request, but it does not require that the President himself make any such report. Section 654 applies only to findings as to which the President himself is required to report to Congress.

²³ As originally enacted, Hughes-Ryan forbade the CIA to spend appropriated funds for covert foreign operations unless and until the President had made the requisite national security finding and had "report[ed], in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress".

²⁴ See 120 Cong. Rec. 33,490 (1974), reproducing Senator Hughes' proposed amendment, which would have permitted the President to authorize covert operations "if, but not before, he (1) finds that such operation is vital to the defense of the United States, and (2) transmits an appropriate report of his finding, together with an appropriate description of the nature and scope of such operation" to certain congressional committees.

inapplicable.²⁵ We therefore conclude that section 654²⁶ by its own terms does not apply to the Hughes-Ryan Amendment.

This conclusion is reinforced by the structure of the Foreign Assistance Act and long-standing practice. This Act deals primarily with overt foreign aid, including military assistance. To subject covert operations, including covert arms transfers, to the requirements of section 654(c), which requires publication in the Federal Register, would not make much sense, especially now that the National Security Act contains an elaborate mechanism by which Congress is kept informed of covert

²⁵ The language ultimately adopted by Congress was taken from the House of Representatives' version of the proposed amendment. See 120 Cong. Rec. 39,135 (1974); H.R. Conf. Rep. No. 1610, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6734, 6744-6745.

²⁶ This analysis does not leave section 654 without any applications. Chapter 32 of title 22 contains numerous provisions requiring both a presidential finding or determination and a report to Congress concerning such finding or determination. See, e.g., 22 U.S.C. 2364(a); 2370(f); 2371(b); 2414a(b); 2428b(b); 2429(b)(1); 2429a(b)(2)(A). Furthermore, chapter 32 also contains numerous provisions requiring presidential findings or determinations without also requiring a congressional report. See, e.g., 22 U.S.C. 2179(a); 2183(a); 2199(b); 2314(b); 2357(a); 2360(a); 2370(a); 2775. Thus, there is a meaningful distinction, reflected in the language of section 654, between findings concerning which the President must report to Congress and findings concerning which no such report is required.

It should be noted that the legislative history of section 654 suggests that it was enacted in response to incidents in which (1) the Nixon Administration provided military aid to Cambodia and obtained the presidential determination required by the Foreign Assistance Act after the fact; and (2) President Nixon orally determined to authorize military aid to Ceylon, but did not put the determination in writing or inform Congress until some weeks later. S. Rep. No. 431, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Admin. News 1883, 1895-1896. The legislative history of section 654 cannot properly be used to draw inferences about the subsequently enacted Hughes-Ryan Amendment, especially if those inferences would be contrary to the language and legislative history of Hughes-Ryan itself.

operations.²⁷ We are informed by the General Counsel of the CIA that presidential findings made pursuant to Hughes-Ryan have never been published in the Federal Register, and that Congress has never objected to this practice. This confirms our conclusion, based on the language and legislative history of the statutory provisions at issue, that section 654 does not apply to presidential findings under Hughes-Ryan.²⁸

Our conclusion, that Hughes-Ryan findings may take the form of an oral authorization for a particular operation, agrees with previous opinions by Attorney General Bell,²⁹ by this Office,³⁰ and by the Legal Adviser at the Department of State.³¹

²⁷ The anomalous nature of publishing notice of covert operations in the Federal Register is reduced, but not completely eliminated, by the following provision in section 654(c): "in any case in which the President concludes that such publication would be harmful to the national security of the United States, only a statement that a determination or finding has been made by the President, including the name and section of the Act under which it was made, shall be published." 22 U.S.C. 2414(c). Some covert operations could well be so sensitive that the mere publication of the section of the act under which a presidential finding was made could in some circumstances serve to alert a foreign intelligence agency to the possible existence of the operation.

²⁸ This conclusion is further strengthened by the nature of section 654(d), which requires the executive branch to respond to inquiries about presidential findings before the report concerning them has been transmitted to Congress. Such a provision would make no sense as applied to the covert operation findings required by Hughes-Ryan.

²⁹ In a classified memorandum of Oct. 20, 1977, for the Assistant to the President for National Security Affairs, which dealt with a particular proposed covert operation, Attorney General Bell opined that the President's decision that the operation was important to the national security constituted the finding required by Hughes-Ryan "notwithstanding the fact that his finding has not been reduced to writing."

³⁰ OLC Memorandum for the Attorney General, Oct. 25, 1977, on Requirements of the Hughes-Ryan Amendment, 22 U.S.C. 2422, at 6 & n.9.

³¹ Memorandum of Dec. 11, 1986, to the White House Counsel et al. on Validity of Oral Instruction to Initiate Covert Action;

IV. - Other Legal Objections to the Arms Shipments

A number of other legal provisions have been mentioned as possibly raising problems about the arms transfers to Iran. None of them raises serious questions, and they warrant only a brief discussion.

A. Omnibus Diplomatic Security and Antiterrorism Act of 1986.

Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, 874 (1986), which became effective August 27, 1986, amended the Arms Export Control Act by adding a new section providing:

(a) Prohibition.--Except as provided in subsection (b), items on the United States Munitions List may not be exported to any country which the Secretary of State has determined, for purposes of section 6(j)(1)(a) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), has repeatedly provided support for acts of international terrorism.

(b) Waiver.--The President may waive the prohibition contained in subsection (a) in the case of a particular export if the President determines that the export is important to the national interests of the United States and submits to the Congress a report justifying that determination and describing the proposed export. Any such waiver shall expire at the end of 90 days after it is granted unless the Congress enacts a law extending the waiver.

The Secretary of State has identified Iran as a country that has repeatedly³² provided support for acts of international terrorism.

The same reasons that require treating the covert arms shipments to Iran as outside the ambit of the Arms Export Control Act also require that this new amendment to the same Act be treated as inapplicable to covert arms shipments. The President

³² 49 Fed. Reg. 2836 (1984).

has independent authority, recognized in the National Security Act, for transferring arms in the course of covert intelligence-related operations; the congressional notification requirement in the above-quoted provision is at odds with the congressional oversight process established in section 501 of the National Security Act; and the sparse legislative history of this new provision gives no indication of an intent to override section 501. We therefore conclude that this new provision was not violated by the covert shipment of arms to Iran.

B. Export Administration Act of 1979.

Section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. 2405(j), limits the issuing of licenses for the export of goods or technology to countries that the Secretary of State has identified as having repeatedly provided support for acts of international terrorism. This statute does not apply to items on the United States Munitions List, which are covered instead by the Arms Export Control Act. Nor does the statute apply to shipments by the United States government, for which no "license" is required. The Export Administration Act is therefore inapplicable to the Iran project.

C. Executive Order 12333

It has been suggested that the Iran project in some way violated the provisions of E.O. 12333, which is the executive order dealing with the structure and conduct of the nation's intelligence effort. E.O. 12333, however, like all executive orders is a set of instructions from the President to his subordinates in the executive branch. Activities authorized by the President cannot "violate" an executive order in any legally meaningful sense, especially in a case where no private rights are involved, because his authorization creates a valid modification of, or exception to, the executive order.

V. Three-way Transactions Involving Israel

Robert McFarlane, formerly Assistant to the President for National Security Affairs, in the public testimony previously mentioned, has said that the arms transfers that took place before January 17, 1986 were accomplished by inducing Israel to ship weapons, which she had obtained from the United States, to Iran on the understanding that our government would replenish Israeli stocks; we also gather that the commitment to resupply Israel was kept. As a legal matter, we believe that such a transaction is equivalent to one in which the United States sells the weapons directly to Iran.

Assuming that the weapons shipped to Iran were originally supplied to Israel under the Foreign Assistance Act or the Arms Export Control Act, Israel would have been forbidden to retransfer them to Iran without the consent of the President.³³ These statutes permit the President to consent to retransfers, but they also require him to comply with a number of formalities. (1) Under the Arms Export Control Act, the President must not consent to a retransfer "unless the United States itself would transfer the defense article under consideration to that country."³⁴ (2) Furthermore, retransfer of Munitions List items is not permitted under this Act unless "the proposed recipient foreign country [i.e. Iran] provides a commitment in writing to the United States Government that it will not transfer such defense articles . . . to any other foreign country or person without first obtaining the consent of the President."³⁵ (3) Finally, the President must "promptly submit a report to the Speaker of House of Representatives and to the Committee on Foreign Relations of the Senate on the implementation of each [retransfer] agreement."³⁶ So far as we know, the second and third of these requirements were not complied with.

The President also has special statutory authority to authorize military assistance and arms export sales, but the

³³ 22 U.S.C. 2314(a); 2753(a)(2).

³⁴ 22 U.S.C. 2753(a). The Foreign Assistance Act contains a similar provision. 22 U.S.C. 2314(e). This language appears to allow presidential approval if the United States would itself transfer the defense article under some authority other than the Arms Export Control Act (e.g., as part of a covert operation undertaken pursuant to the National Security Act). If this interpretation is correct, the requirement would have been satisfied as to the Iranian project. As we point out in the text, however, there appear to be other formalities that were not satisfied.

³⁵ 22 U.S.C. 2753(a). The Foreign Assistance Act contains a similar provision. 22 U.S.C. 2314(e).

³⁶ 22 U.S.C. 2753(a). The Foreign Assistance Act does not contain a similar provision.

It should also be noted that the Arms Export Control Act imposes additional congressional notification requirements for retransfers of "major defense equipment" valued at \$14 million or more and for other retransfers valued at \$50 million or more. 22 U.S.C. 2753 (d). "Major defense equipment" is defined as "any item of significant military equipment on the United States Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000." 22 U.S.C. 2794(6).

exercise of this authority is contingent upon prior consultations with certain congressional committees,³⁷ which again does not seem to have been done.

Assuming that the formalities and congressional notification requirements discussed in the previous paragraph were not complied with, the arrangement with Israel cannot be regarded as a retransfer specifically authorized by the Foreign Assistance Act or the Arms Export Control Act. We do not believe, however, that these statutes are the only authorities that could justify the transaction. Nor do we believe that the three-way transactions involving Israel and Iran are properly analyzed under these statutes.

In evaluating the legal significance of the shipment to Iran of weapons from Israeli stocks, one must focus on the nature of the three-way transaction as a whole. According to Mr. McFarlane's testimony, the transaction was designed to expedite the arrival in Iran of arms that could lawfully have been supplied directly from American stocks; further, Israel participated in the transaction as an accommodation to the American government, and did not itself gain or lose any weapons as a result. Seen in this light, it is apparent that the real nature of the transaction was a bilateral sale between the United States and Iran, with Israel serving solely as a conduit or facilitator in the execution of that sale.

We see no reason to treat the legality of Israel's participation differently than we would treat the participation of any other party that served as a conduit in a lawful covert operation. Had the United States consigned weapons from American stocks to Israel for shipment to Iran, Israel's role would have been exactly equivalent to the role that common carriers or public warehouses play in overt transactions. Because, so far as we know, the weapons that Israel shipped to Iran and received from the United States were completely fungible, a similar equivalence is present here. Just as an illegal sale of arms to Iran could not be made legal by using Israel as a conduit, so too a legal transaction could not become illegal by Israel being used

³⁷ 22 U.S.C. 2364.

³⁸ This memorandum does not deal with the financing of the transaction, the details of which are apparently not yet clear. If Israel retained some of the funds that the Iranians paid for the weapons, the analysis might change, depending on whether the retained funds were viewed as a fee in the nature of a brokers' commission or as profit on a resale. Without now deciding how the analysis would differ, we can note that retention of some funds by Israel would make it less obviously appropriate to treat the whole transaction as essentially a bilateral sale of U.S. weapons to Iran.

in the same way.³⁹

Several features of the relevant statutes support this analysis. First, the statutes restricting retransfers of American-supplied weapons clearly contemplate situations in which the transferring country, not the United States itself, is the source of the request to make the transfer. The Arms Export Control Act, for example, requires the recipient of American arms (in this case, Israel) to agree not to transfer the arms to a third country (e.g., Iran) without the President's approval,⁴⁰ and then goes on to specify certain factors that the President must look to "[i]n considering a request for approval of any transfer" Clearly, the statute is not aimed at situations in which the President is considering requests from himself for his own approval. The Foreign Assistance Act contains similar provisions, to which the same analysis applies.⁴¹

The Arms Export Control Act also makes an express distinction between arms exports by private parties in the United States (which ordinarily require an export license) and exports by such private parties "by or for an agency of the United States Government . . . (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means" (which do not require an export license).⁴² Analogously, a distinction should be made between Israel's transferring American-supplied arms for her own benefit (which would be subject to the retransfer requirements of the Foreign Assistance Act or the Arms Export Control Act) and such transfers "by or for an agency of the United States Government" (which were not contemplated by the retransfer provisions of those statutes). That Israel's shipments of arms to Iran were "by or for an agency of the United States Government" is clear from (1) the fact that the Israeli shipments were made at the request of American authorities, and (2) the fact that Israel was promised and given identical replacements for the arms that she shipped to Iran.

³⁹ So far as we know, there is no legal bar to the use of Israeli help in American intelligence operations.

⁴⁰ 22 U.S.C. 2753(a).

⁴¹ See 22 U.S.C. 2314(a)(1)(B); 2314(e).

⁴² 22 U.S.C. 2778 (b)(2). Note that this provision appears to assume that there may be arms sales programs carried out pursuant to legal authorities other than the Arms Export Control Act.

Conclusion

For the foregoing reasons, we conclude that a covert intelligence or intelligence-related operation, authorized by the President and conducted by members of the NSC staff and/or the CIA, could lawfully have included the sale of arms to Iran. Such an operation would have been carried out pursuant to presidential powers recognized in sections 101 and 102 of the National Security Act. An oral authorization by the President would have sufficed to allow CIA participation under the Hughes Ryan Amendment. The use of Israel's American-supplied weapons, under an arrangement by which Israeli stocks were later replenished, appears not to have violated the conditions under which American weapons are supplied to Israel.

A handwritten signature in dark ink, appearing to read "Chas. J. Cooper", written in a cursive style.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel